

In the Matter of Merchant Mariner's Document No. Z-486652-D4
Issued to: ESTEVAO SILVESTIN

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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ESTEVAO SILVESTIN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

On 18 June, 1951, an Examiner of the United States Coast Guard at New Orleans, Louisiana, revoked Merchant Mariner's Document No. Z-486652-D4 issued to Estevao Silvestrin upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as smoking room steward on board the American SS DEL MAR under authority of the document above described, on or about 30 May, 1951, while said vessel was in the port of Rio de Janeiro, Brazil, he wrongfully and with force indecently assaulted Sarah Hautzenroeder age 10, a passenger aboard said ship.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. He was represented by an attorney of his own selection and he entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer and Appellant's counsel made their opening statements and the Investigating Officer introduced in evidence the testimony of ten year old Sarah Hautzenroeder, her parents, and Miss Shirley Rosenquist.

In defense, Appellant offered in evidence the testimony of crew members Julius P. Thrasher and Lonnie Hargesheimer, Miss Shirley Rosenquist, and his own testimony taken under oath.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification and entered the order revoking Appellant's Merchant Mariner's Document No. Z-486652-D4 and all other licenses, certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that:

- I. The decision is at variance with the testimony of Hargesheimer, bedroom steward, who testified that all stateroom doors were equipped with automatic locks and he had

unlocked this particular door to admit Appellant, who, if he was accompanied by this girl, was followed by her; and during the next two minutes while Hargesheimer was occupied with his duties, he heard the door close; and Appellant did not and could not have reentered the cabin because the door was not opened for him again by Hargesheimer.

- II. The decision incorrectly reports the testimony of Thrasher who testified that the child was on deck in his presence for not less than 15 to 30 minutes after going to the stateroom for the raincoat which is at complete variance with the child's testimony that there was a second trip to the stateroom within three or four minutes after the first visit.
- III. The evidence proves and the Investigating Officer admitted that the alleged assault could not have been committed during the trip to the stateroom for the raincoat; and, as shown above, a second visit was a physical impossibility since the door was locked after the first visit and the child was in the presence of Thrasher for 15 to 30 minutes after the first visit.
- IV. The testimony of Appellant to the effect that he was followed by the child and had difficulty in persuading her to leave the stateroom is corroborated by the testimony of Miss Rosenquist who testified that the child was meddlesome and had to be forcibly ejected on one occasion from the Maison Blanche store aboard the ship.
- V. There is testimony that an incident similar to the one alleged had occurred in Rio de Janeiro and that the child was of such a temperament as to desire constant attention. The child knew that such an accusation would immediately draw to her the undivided attention of her parents who had been neglecting her for from four to six hours during a cocktail party aboard ship.
- VI. The testimony of the child's parents was that the ship's physician came to the parents' stateroom to attend someone who had passed out from intoxicants but the doctor was not asked to examine the child despite her complaints and alleged hysteria. This fact, together with the parents' testimony that the child's clothes were in no way disarranged or mussed; conclusively establishes that the child was in no way harmed.
- VII. A review of the entire record will disclose that the findings are at complete variance with the evidence.

It is submitted that the evidence conclusively establishes Appellant's innocence but that, even if the findings are affirmed, the order should be reduced in view of the facts mentioned in Point VI above.

APPEARANCES: Messrs. Burton and Burton of New Orleans, Louisiana, by Robert H. Burton, Esquire, of Counsel.

Based upon my examination of the Record submitted, I hereby make the following

FINDINGS OF FACT

On 30 May, 1951, Appellant was serving as smoking room steward on board the American SS DEL MAR and acting under authority of his Merchant Mariner's Document No. Z-486652-D4 while the ship was in the port of Rio de Janeiro, Brazil.

At approximately 1400 on this date, Sarah Hautzenroeder and her parents went aboard the DEL MAR as passengers. Guests at Mr. and Mrs. Hautzenroeder's farewell party began to arrive at their cabin about an hour after they had boarded the ship. This party was still in progress up to the occurrence of the events which took place between 2000 and 2030. Sarah was with her parents for very little of the interim time.

The cabin deck of the DEL MAR was one deck below that on which the gangway was located. A Maison Blanche store was on the cabin deck about four doors from the Hautzenroeders' cabin and the quarters of the store's concessionaire, Miss Shirley Rosenquist, were next to the store. Upon entering the latter's cabin, there was a short, narrow passageway opening into the room to the left. The bunk was alongside the far bulkhead and there was a passageway leading to the bunk between a considerable amount of store merchandise, suitcases and other gear on the left, and dresser drawers on the right. This situation caused the passageway between the door and the bunk to be so narrow that it would be difficult for two persons going in opposite directions to pass each other.

In the evening, Sarah went to look at the Maison Blanche store and then went up to the gangway deck where Appellant was in the vicinity of the gangplank waiting for a telephone call. Shortly thereafter at about 2000, Miss Rosenquist called from the dock and asked Appellant to go to her cabin and bring her raincoat to her. Sarah accompanied Appellant to the deck below to get the raincoat. The room steward unlocked the door to Miss Rosenquist's cabin for Appellant to enter. He went to the far side of the room and picked up the raincoat which was lying on the bunk. Sarah had entered the room after Appellant and she was reluctant to leave. Appellant passed her in the narrow passageway between the gear and dresser, and took her by the arms to get her to leave. Sarah was on the verge of crying and Appellant kissed her slightly on the cheek in an attempt to console her. They left the cabin, went up to the gangway deck, and Appellant gave the raincoat to Miss Rosenquist. It did not take more than the normal length of time for Appellant to go to the cabin and obtain the coat.

Between 2000 and 2030, Sarah ran into her parents' cabin while crying and whispered to her mother that something horrible had happened. The parents and Sarah went into an adjoining room and she quieted down enough after a few minutes to tell her parents that a man had kissed her and put his hands all over her under her dress. Sarah's clothes were not mussed or disarranged in anyway noticeable to her parents and there was no indication that she had been bruised or otherwise injured. There was a physician present treating someone who had become unconscious in the Hautzenroeder's cabin but they did not have Sarah examined by him at this time or later. Sarah was

described by her parents as being excitable, high strung and nervous but not prone to exaggerate or lie.

About fifteen minutes later, Sarah went out on deck with her father in an attempt to identify the man she stated had attacked her. Upon arriving at the gangway deck, Appellant was standing at approximately the same place he had been before going to get Miss Rosenquist's raincoat. Sarah pointed him out as the person who had abused her. Mr. Hautzenroeder and another man approached Appellant in a belligerent manner, asked him "what he was trying to do" and threatened to throw him off the ship. Appellant denied having run his hand up her dress but admitted having held Sarah by the hands and kissing her; and he promised not to do anything of that nature again if the charge was not pressed. Mr. Hautzenroeder's friend had been drinking more than the former and the friend's attitude was more threatening towards Appellant. Finally, they took Appellant to see the Master about the matter. There is nothing in the record concerning what action was taken by the Master or whether Appellant was logged for his actions.

OPINION

The issue in this case is whether there was a second visit to Miss Rosenquist's room, by Sarah and Appellant, during which time the alleged assault occurred. There is no claim that the incident took place at the time Appellant obtained the raincoat and Sarah does not deny Appellant's story as to what occurred in the cabin at that time.

Sarah's testimony is that after returning to the gangway with Appellant to give Miss Rosenquist her raincoat, she went back to the store and was talking with "Frank," a bellboy, when Appellant returned to the cabin deck and asked Sarah to return to Miss Rosenquist's cabin with him less than five minutes after their first visit. Sarah stated that Appellant then put her on the bunk with his knee on her stomach and his hand on her body under her clothing; that when she started to cry, he kissed and hugged her and went to look in the dresser drawers for some gum to give to her; and that when Appellant had released her for the latter purpose, she ran out of the room and to her mother's cabin. Sarah also testified that she thought "Frank" was the only person who saw her leave the cabin and run to her mother. There is no testimony by "Frank" in the record although Sarah testified repeatedly that she saw him when she left Miss Rosenquist's cabin the second time.

Appellant's defense is based mainly upon the testimony of the man with the gangway watch, Julius P. Thrasher, who stated that Sarah had remained in the vicinity of the gangway demonstrating dance steps for close to a half hour after returning from the trip for the raincoat; and that of the room steward, Lonnie Hargesheimer, who testified that the cabin doors had automatic locks which could not be opened without a key from the outside when closed and that he heard the door close not more than a minute and a half after he had opened it for Appellant to get the raincoat.

It is also of possible significance that Sarah's appearance was not noticeably disturbed nor was she hurt physically; that it would be unusual for a hysterical person to have noticed Frank, the approximate number of people in her parent's cabin and what they were doing; that Sarah testified she went to the cabin a second time even though Appellant did not have hold of her and she was

scared before entering; and that Appellant made no attempt to hide but was at the same place he said he had been all the time except when he went to get the raincoat.

In addition to making several erroneous recitations of fact and misleading statements, the Examiner rejected Appellant's testimony on the basis of its improbability and the incorrect conclusion that the testimony of Thrasher and Hargesheimer did not support Appellant's nor discredit Sarah's testimony. For the reasons mentioned pertaining to the testimony of these two members of the crew, I cannot agree with this conclusion.

Concerning the two probabilities upon which the Examiner depended to discard Appellant's testimony, much stress is placed upon the difficulty Appellant would have had in passing Sarah in the narrow passageway in the room when they had gone there to get the raincoat. It seems to me that this passing would have been much less difficult than for Sarah to have run past Appellant, on the alleged second visit, when he was looking for gum in the dresser drawers. The second probability, that it was unlikely for Sarah to have remained normal for 15 or 20 minutes after leaving the cabin and then to have run to her mother, is a reasonable basis for believing Sarah's testimony as to a second visit.

Appellant's admission that he kissed Sarah on the cheek does confirm Sarah's testimony in part; but, on the other hand, it is possible that Sarah's story is an exaggerated version of what happened as related by Appellant when he went to get the raincoat. As stated before, Appellant's testimony as to what occurred on this visit was never denied. He stated that he had passed Sarah in the narrow passageway and had held her arms and kissed her once in order to get her to leave the cabin.

CONCLUSION

In view of these defects, it is my opinion that there is not substantial evidence in the record upon which to find the charge and specification proved.

Because of the partially incorrect bases upon which the testimony of Appellant was rejected as well as the other factors mentioned above, I feel that corroboration of Sarah's testimony is essential to the proof of the offense alleged. The best evidence to confirm or impeach Sarah's testimony would be the testimony of "Frank," the bellboy, since Sarah definitely stated that he saw her run out of Miss Rosenquist's cabin after the alleged second visit. Evidence of secondary value would be any log entries in connection with the incident and the testimony of the Master as to what he was told and what action he took when approached by Mr. Hautzenroeder shortly after the occurrence of the alleged assault.

ORDER

The order of the Examiner dated 18 June, 1951, is reversed and the case remanded for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 4th day of February, 1952.